

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1903

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United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM A. BARRETT, M.D.,

Plaintiff-Appellant,

—against—

UNITED HOSPITAL; RICHARD A. STOLNACKE, Executive Director of United Hospital, individually and in his official capacity; ALFRED D. GRANT, M.D.; JAMES A. SUDBAY, M.D.; EUGENE WASSERMAN, M.D.; J. DOUGLAS HALLOCK, M.D.; H. CLAY JOHNSON; WILLIAM H. JENNINGS; CHARLES R. C. STEERS; WILLIAM REES; JACK GANTZ; RICHARD D. LOMBARD; DAVID GILE; RICHARD W. DAMMON; MRS. THOMAS H. LANE; EDWIN H. KAUFMAN, M.D.; CHARLES J. ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.; H. EUGENE SEANOR, M.D.; DAVID A. WILSON, M.D.; JOHN H. DALE, JR., M.D.; LEO T. DELANEY, M.D.; MRS. EDNA DELZIO, R.N.; WILLIAM C. FELCH, M.D.; ABRAHAM L. HALPERN, M.D.; MRS. HARVEY KELSEY; LAWRENCE MARX, JR.; MRS. EMIL MOSBACHER, JR.; MARTIN NESCHI, M.D.; JOEL J. SCHWARTZMAN, M.D.; JOSEPH SILBERSTEIN, M.D.; DAVID A. W. WILSON, M.D.; C. JONATHAN SHATTUCK; SAMUEL DRAGO, M.D.; VIRGINIA HAGGERTY, M.D.; PHILIP JENSEN, M.D.; SHELBY LEVER, M.D.; HAROLD ROTH, M.D.; JACOB SHRAGOWITZ, M.D.; and RONALD DEE, M.D.,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

APPELLANT'S BRIEF

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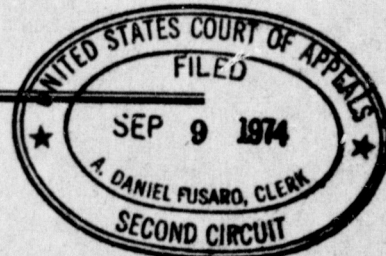


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UNITED STATES COURT OF APPEALS
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WILLIAM A. BARRETT, M.D., :
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-against- : No. 74-1903
UNITED HOSPITAL, et al., :
Defendants-Appellees. :
- - - - - x

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The judge who rendered the decision appealed from is United States Judge Arnold Bauman of the United States District Court for the Southern District of New York. His decision is not yet reported.

QUESTION PRESENTED

Whether United Hospital is so affected by New York and federal activities in its function, supervision, operation, structure and activities that its action in arbitrarily refusing to grant staff privileges to a former staff physician is subject to constitutional standards and redress on the theory of "state action."

The court below answered in the negative, holding that the action of the Hospital was not protected against "however discriminatory or wrongful." (R 204A)

STATEMENT OF THE CASE

Appellant physician was for almost twenty years a member of the staff of United Hospital in Port Chester, Westchester County, New York. In 1966 he was indicted upon a charge of criminal abortion and in 1968 his plea of guilty to assault was accepted in satisfaction of all charges. His license to practice medicine in New York State and his staff privileges at United Hospital were revoked. On February 4, 1971, his license to practice medicine was restored effective July 1, 1971 and plaintiff immediately applied for a restoration of privileges at United Hospital. Appellant's application was considered by the various committees, councils and boards of the hospital and was rejected. Appellant requested a hearing which resulted in affirmation of earlier actions of denial of privileges.

Plaintiff commenced this action for declaratory, injunctive, mandamus and monetary relief alleging violations of his rights under the First, Fifth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §§ 1983, 1985 and 1986, asserting jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1361.

Defendants, the Hospital and members of its various committees, moved to dismiss on the grounds that the complaint fails to state a cause of action and that there is no subject matter jurisdiction. The Court, pursuant to Rule 12(b), treated the matter as a motion for summary judgment and dismissed the complaint in an opinion evolving and articulating a new test for state action denominated by the Court "a three pronged test" requiring that state involvement be "significant," directly involved with the activity attacked (the "nexus" requirement) and that the involvement relied upon as significant and connected must "aid, encourage or connote approval of the complained of activity."

The physician plaintiff appeals from the dismissal of the action.

SUMMARY OF ARGUMENT

The newly articulated three pronged test is not the proper standard, but the allegations of the complaint nonetheless meet those elements, even in this case in which no racial discrimination is involved but rather punishment and ostracism of a physician who performed an abortion prior to the determination by the Supreme Court of the United States that such an act could not be criminalized.

The United Hospital is so involved in every aspect of its existence, function and control with the State of New York and the United States of America that procedures for determination and denial of staff privileges cannot lawfully fall short of constitutional standards.

ARGUMENT

THE OVERVIEW

UNITED HOSPITAL IS SO INTERTWINED IN EVERY ASPECT OF ITS BEING AND FUNCTIONING WITH ACTIVITIES, SUPERVISION, REQUIREMENTS, FINANCING, SUPPORT, REGULATION AND CONTROL BY THE STATE OF NEW YORK AND BY FEDERAL FINANCING THAT IT COMES WITHIN THE STATE ACTION THEORY

Once again this Court is challenged and invited "to wade 'into the murky waters of the state action doctrine.'" Jackson v. Statler Foundation, 496 F. 2d 623, 626 (2d Cir. 1973; revised and rehearing en banc denied 1974).

It is the Jackson case which to a large extent is relied upon by the Court below and it is the Jackson case to a large extent upon which appellant herein also relies.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) is also looked to as support for the dismissal of the complaint

in this action, but Moose Lodge is distinguishable and actually supports the position urged by appellant. As pointed out in the opinion of the Court by Mr. Justice Rehnquist, the status of Moose Lodge as a private club is what distinguishes it from those cases where a state action theory has been invoked. Particularly, of course, the seminal case of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) must be dealt with. In Moose Lodge, "there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees....*** Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large. Nor is it located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the State. In short, while [the business concerned] was a public restaurant in a public building, Moose Lodge is a private social club in a private building." Moose Lodge No. 107 v. Irvis, supra, at 175.

Admittedly, the land upon which United Hospital building stands is not state owned, but that appears to be the only element which would put it over on the Moose Lodge side rather than the Burton side. The fact that the underlying land may not be owned by the State certainly does not make the hospital a private building, however. Appellant does not argue that United Hospital is not formally a private institution, but so was the Eagle Restaurant in Burton. United Hospital is at least as open to the ill and injured resident or transient as the Eagle Restaurant is to the hungry traveller.

In Jackson, supra, this Court set forth five factors important to a determination of state action. Admittedly, at page 635, the Court said that its "formulation of this definition of 'state action' is applicable only to claims of racial discrimination," but appellant urges that, while a claim of unlawful action other than racial discrimination may traditionally call for greater scrutiny of state involvement, and the quantum of involvement to be established may be greater, the elements remain the same.

Appellant in no way wishes to appear to concede that constitutional claims under the First, Fifth, Eighth and Ninth Amendments are to be afforded no protection against a wrongdoer who in precisely the same circumstances would be held

to judicial account for wrongs under the Fourteenth Amendment, but the appellant argues at this stage of this action that at least appellant is entitled not to have his complaint dismissed so that he can go forward and prove his case since the appellant is convinced that a trial will develop such a weighty and overwhelming detail and amount of state involvement that any conceivable test will be satisfied.

FACTOR I: FISCAL DEPENDENCE

The first of the Jackson five factors is "the degree to which the 'private' organization is dependent on governmental aid." Jackson v. Statler Foundation, supra, at 629. The complaint alleges (paragraph THIRD, RBA)* that the defendant United Hospital is "funded, regulated, and controlled fully or in part by the State of New York and the United States of America with respect to matters including, but not limited to, the construction and acquisition of facilities and equipment, licensing, inspection, payments for supplies and services to patients, medicines, Medicare and Medicaid, granting of tax benefits, and the setting of standards governing the conduct of activities of and in United Hospital, including the promulgation of rules and regulations of the Hospital." For purposes of the motion below and this review by the Court, the allegations

*Here and henceforth herein citations "R digitA" refer to pages of the Appendix.

the plaintiff must be taken as true. United States v. New
inkle, Inc., 342 U.S. 371 (1952). The defendants at no point
e suggested the contrary either as a matter of procedure in
ling with the motions to dismiss or as matters of fact.

The defendants admit that the hospital itself was
lt with Hill-Burton [42 U.S.C. §§291 et seq.] money. Not
y is it conceded that the very buildings and equipment in
buildings were constructed and provided by public funds
m both State and federal sources, but it is not argued, nor
the allegations denied, that the funds for operating these
ilities come from the public tills. The mere tax exempt
tus of the foundations in Jackson was held to satisfy this
st factor. Here there is tax exempt status in addition to
actual contribution of capital construction funds and oper-
ng budgets. If, because here there is no claim of racial
crimination, a greater degree of dependency on governmental
is required, that element is present.

In this connection, an expression of Congressional
ent, purpose and understanding is available. In enacting
Health Program Extension Act of 1973 (Pub. L. 93-45, affect-
June 18, 1973) a Section 300a-7 was added to Title 42
Stat. 95) reading:

§300a-7. Sterilization or abortion--Prohibition of public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions

(a) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require--

(1) Such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to--

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

DISCRIMINATION PROHIBITION

(b) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Development Disabilities Services and Facilities Construction Act after June 18, 1973, may--

(1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(2) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

Obviously Congress believed that the receipt of funds under Hill-Burton and the other Acts referred to would, in the absence of §300 a-7, so inject state action into a hospital's status as by itself to justify a court to require standards of conduct. Congress has thus adopted the Fourth Circuit rule rejected by the court below herein. (R203A).

FACTOR II: GOVERNMENTAL REGULATION

The second factor in Jackson is "the extent and intrusiveness of the governmental regulatory scheme." The THIRD paragraph of the complaint sets forth that the Hospital is "regulated and controlled fully or in part by the State of New York and the United States of America with respect to ... licensing, inspection, services to patients, medicines... and the setting of standards governing the conduct of the activities of and in United Hospital, including promulgation of the rules and regulations of the Hospital." On these motions to dismiss the complaint, uncontradicted by any opposing affidavits or even argument, it would be hard to imagine a more

thoroughly extensive and intrusive governmental regulatory scheme than that set forth. The complaint leaves out no activity of the Hospital as to which it is not accountable to the State of New York and as to which there is no State intrusion. The attention of this Court is respectfully invited to Parts 720 and 721 of the State Hospital Code of the State of New York, and all other provisions of the State Hospital Code, to see the minutia and pervasiveness of State intrusiveness.

FACTOR III: GOVERNMENT APPROVAL

The third factor of Jackson is "whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation."

Without exception, the allegations of the complaint and the affidavits on both sides show that the governmental regulatory scheme is not only extensive and intrusive, but exclusive in that its aid and support, its recognition and approval of a hospital, are contingent upon maintenance of standards. As the paragraph of the complaint referred to makes clear, the State not only provides funding for construction and operation, but it licenses the operation and inspects to see that the standards which it sets governing the conduct and all of the activities of the Hospital are complied with and that the Rules

and Regulations of the Hospital as promulgated are within the parameters established by the State of New York. Not only is the creation of a "community hospital" such as United Hospital subject to approval or disapproval by the State of New York, but its continued existence is contingent upon satisfactorily surviving inspections and visitations made by the State of New York affirmatively ascertaining that the standards of conduct and activity required by the State of New York are lived up to.

FACTOR IV: PUBLIC FUNCTION AND
SURROGATE STATUS

The fourth factor is "the extent to which the organization serves a public function or acts as a surrogate for the State."

The Constitution of the State of New York, Article 17, §3 provides:

Protection and promotion of the health of the inhabitants of the State are matters of public concern and provision therefor shall be made by the State.

The State of New York has elected to effect this policy by means of a coordinated plan of building and maintaining public hospitals for certain functions and areas and by certifying and regulating private hospitals as part of the carrying out of this policy. Public Health Law §§2800 et seq.

In order to insure adequate distribution of health services to the residents and sojourners in the State of New York, the State has delegated in those areas not served by State owned and operated hospitals its constitutional obligations to protect and promote the health of the inhabitants. Appellant United Hospital is such a delegee of State power and an assumer of the State obligation pro tanto.

United Hospital has acted as an agent of the State of New York to which has been delegated and which has assumed the obligation of the State to provide health care facilities and services to the inhabitants of the communities of Mamaroneck, Port Chester and Rye. United Hospital is the only general hospital serving the many thousands of inhabitants of that area. All emergency medical cases within the area of the Hospital are brought to United Hospital, and United Hospital only, and United Hospital must accept them because it is its duty to perform that function of the State of New York, pursuant to Public Health Law §2806. Furthermore, United Hospital acts as the agent of the State of New York in discharging the obligation, assumed by the State and delegated to United Hospital, to accept for treatment all indigents who require immediate hospitalization without regard to ability to pay. Public Health Law 2805-a.

Such extensive delegation and regulation of public duties have been found to constitute important factors in determining the presence of state action. McCabe v. Nassau County Medical Center, 453 F. 2d 698 (2d Cir. 1971).

It has been argued that the provision of health care has traditionally been a private rather than a public function. While this may be true outside the State of New York, Article 17, §3 of the State Constitution makes the rule otherwise in New York. Besides, what may have been a traditionally private function in times past has now become a traditionally public function. We are on the verge of some sort of national health insurance. Hospitals were regarded by some in years gone by as philanthropies to be created and supported by the wealthy for the benefit of themselves as well as of their less affluent neighbors. Appellant asks the Court to take judicial notice of the fact that this is no longer the social or governmental norm. The right to health at the hands of government is an almost universal expectation of the members of our society. The fact that those more fortunate than others may subsequently be required to reimburse the State for some or all of the care provided is not inconsistent with the provision of the care by the State.

United Hospital is an integral part of a statewide scheme created and administered by the State of New York to meet its constitutional and socially demanded obligation to have a network of medical services available for the people of and in the State of New York.

United Hospital has by Public Health Law §2802 been granted a guaranteed monopoly of the area served by it so that there will be an economically and statistically sound social basis for the support of its facilities so long as it continues to meet the standards of public activity determined by inspections and reports required by the State of New York. The absence of a neighboring comparable hospital even by itself would bring United Hospital within a state action concept. Taylor v. St. Vincent's Hospital, 369 F. Supp. 948 (D.C. Mont. 1973); see also: Meredith v. Allen County War Memorial Hospital Commission, 397 F. 2d 33 (6th Cir. 1968); Foster v. Mobile County Hospital Board, 398 F. 2d 227 (5th Cir. 1968); O'Neill v. Grayson County War Memorial Hospital, 472 F. 2d 1140 (6th Cir. 1973).

That the defendant is the surrogate of the State of New York is clear, if in no other way, from the unchallenged and admitted allegation (R9A) that United Hospital has "had delegated to it by the State of New York certain official

functions, including, but not limited to, the power to grant or withhold professional privileges to physicians and surgeons." A fair reading of such an allegation in connection with such a motion as here at issue must be held to mean that the State has appointed defendant Hospital as its agent within the area of the monopoly (see p. 15 above) granted by the State to determine which physicians and which surgeons can practice their professions with access to the essential facilities of a community hospital and which will be denied and relegated to private proprietary hospitals or forced, indeed, to serve their patients only so far as the hospital gates.

FACTOR V: CONSTITUTIONAL PRIVATE
 ASSOCIATIONAL STATUS

The fifth factor is: "whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms." This Moose Lodge element is simply not applicable on the facts. United Hospital is not a club, but a public service facility. It is not a private business for the benefit of its stockholders (there are none for it is a community hospital) but an entity created by dedicated people to serve a public need.

As a matter of fact and as a matter of law, United Hospital is "open to all comers" in the language quoted by Judge Bauman in his opinion (R 208A) from Powe v. Miles, 407 F. 2d 73, 80 (2d Cir. 1968); Public Health Law §§2805-a and 2806.

JUDGE BAUMAN'S THREE PRONGED TEST

Having dealt with the five elements from the Jackson test, appellant turns now to the novel three pronged test formulated by the District Court.

Prong One: Significant Involvement

As we have seen above, the complaint and the affidavits of both sides read on the motion (R 201A and 202A) make it clear and uncontradicted that United Hospital is "funded, regulated and controlled fully or in part by the State of New York and the United States of America with respect to matters including, but not limited to, the construction and acquisition of facilities and equipment, licensing, inspection, payments for supplies and services to patients, medicines, Medicare and Medicaid, granting of tax benefits and the setting of standards governing the conduct of the activities of and in United Hospital.

including the promulgation of rules and regulations of the Hospital." (R 8A). The pervasiveness of the intrusiveness, from the power of the purse strings upon both capital and operational support to every other conceivable function of a hospital, appears from the discussion of the five factors above. There is no area of hospital administration which does not appear from the state of the record to be significantly, if not, in the words of the uncontradicted complaint "fully" regulated and controlled by the State. The involvement is not only "significant." It is thorough and controlling.

Prong Two: The Nexus With The Activity Concerned

The uncontradicted allegations of the complaint include that United Hospital is "regulated and controlled ... by the State... with respect to ... the promulgation of rules and regulations of the Hospital." (R8A). It is submitted that this nexus with the manner by which the rules and regulations for the creation of procedures for consideration of applications for staff privileges are formulated and administered is sufficient to bring the gravamen of the complaint within the nexus requirement urged by Judge Bauman. The promulgation and administration of the rules which set up the

"Credentials Committee," the "Medical Council of the Medical Staff," the Board of Trustees "Joint Conference Committee" and the "Hearing Panel" of the Board of Trustees (R199A) are all within the precise allegations of State control and regulation and certainly within the fair intendment of the pleading.

The District Court did not reach the issue urged by appellant below that the State of New York, by enacting Public Health Law §2801-b has expressed through the Legislature and Governor its pre-existing interest in the admittedly capricious and arbitrary procedures (R216A) of which the actions of defendants against appellant are but an example. This law provides a State supervisory mechanism with respect to grant and denial of staff privileges. The fact that §2801-b had an effective date after this doctor was turned down does not mean that the state involvement and public concern did not antedate such effective date. Obviously, the opposite is true.

The United States also has intruded into this field with 42 U.S.C. §300 a-7. (b)(1) and (2) [Pub. L. 93-45, 86 Stat. 95] outlawing discrimination, in certain cases, with respect to "employment, promotion, termination of employment of any physician ... or extension of staff or other privileges to any physician"

Mulvihill v. Julia L. Butterfield Memorial Hospital,

329 F. Supp. 1020 (S.D.N.Y. 1971) is distinguishable on the facts of the record from the material in this case. "It was not contended there that the state in any way associated itself with the hospital's methods of hiring and firing physicians. No governmental approval of the hospital's internal by-laws was required" (R215A). The complaint which has been dismissed on the record before this Court, however, singly and uncontradictedly alleges the admitted fact that the State involved itself in "the promulgation of rules and regulations" (R8A) and that (R9A) there have been delegated to the Hospital "by the State of New York certain official functions, including, but not limited to the power to grant or withhold professional privileges to physicians and surgeons."

Thus, appellant has tendered for determination by the Trial Court, among other issues, the involvement by the State "directly in the very activity out of which the challenge in the complaint arises." (R217A).

The citations in the opinion of the District Court at footnote 61 (R228-9A) lend further support to the significant involvement by the State in the very activity of which appellant complains.

Prong Three: State Approval

The Department of Health of the State of New York significantly and officially on behalf of the State of New York, because of the coincidence of the effective date of Public Health Law §2801-b referred to above, advised appellant that the State was keeping hands off the action by the defendants, thus, in effect, stamping official condonation, if not approval, upon the actions of the defendants in depriving appellant of his rights. (R78A).

Shirley v. State National Bank of Connecticut,
_____ F. 2d _____ (2nd Cir. 1974) and Bond v. Dentzer,
_____ F. 2d _____ (2nd Cir. 1974) are distinguishable in that in those cases the State by statute placed restrictive procedures and burdens upon enforcing creditors, attempting to set limits to previously abusive procedures. That is not the case here. In this case, the very promulgation of the rules and regulations of the Hospital were controlled and regulated by the State, as alleged in the undenied third paragraph of the complaint. The action by the official agency of the State charged (Public Health Law §§206-a, 2801-b and 2803; State Hospital Code, particularly Parts 720 and 721) with the function of assuring the adequacy and competence and

non-discriminatory appointment of hospital staff, officially notified appellant and the Hospital that what the Hospital had done in this very area in dealing with applicant was fine and would be allowed to remain effective insofar as the State of New York was concerned.

THE FOUR DECISIONS

The decision appealed from (R212A ff.) seeks support in Grafton v. Brooklyn Law School, 478 F. 2d 1137 (2d Cir. 1974), Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968), Wahba v. New York University, 492 F. 2d 96, (2d Cir. 1974) and Mulvihill v. Julia L. Butterfield Memorial Hospital, supra.

We have dealt with Mulvihill above in at least one significant distinction, but point out most importantly that the plaintiff in Mulvihill apparently relied exclusively upon Hill-Burton construction funding and the allegations of the complaint there dismissed did not include the numerous other bases for finding state action here urged.

Grafton, Grossner and Wahba, are cases involving education above and substantially beyond the traditional secondary schooling which may well by now, and certainly in the State of New York, have become a State function much as

the provision of health care has become. (See Factor IV above). Be that as it may, these three cases also relied exclusively upon funding to invoke a state action theory against institutions not open to all comers, not delegated public functions, not intertwined in a pervasive and intrusive state scheme such as that of which United Hospital is a part.

INDIVIDIOUSLY DISCRIMINATORY MOTIVATION

In the final sections of the opinion below (R22A), the Court relies upon Griffin v. Breckenridge, 402 U.S. 88 (1971) and Jackson v. Norton-Children's Hospital, 489 F. 2d 502 (6th Cir. 1973), cert. den. _____ U.S. _____ (1974). If and to the extent that it is necessary to sustain these portions of the complaint at this stage of this proceeding, appellant urges that a fair and full reading of the complaint sets forth an invidious scheme by the defendant conspirators for the purpose of depriving of hospital privileges, at United Hospital and all other hospitals within a significant surrounding area, a physician who had theretofore and before the determination of unconstitutionality thereof (Roe v. Wade, 410 U.S. 113; Doe v. Bolton, 410 U.S. 179 (1973)) been found to have violated such a statute and offended the religious sensibilities and other prejudices of defendant conspirators. A fair reading

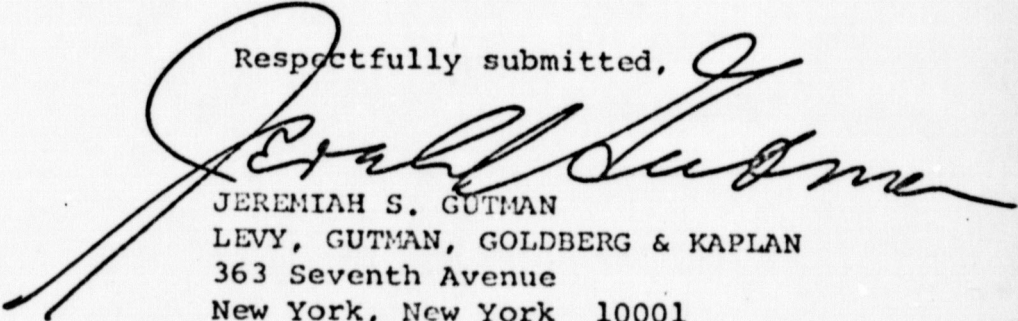
of the complaint includes such a "class-based" animus in violation of the constitutional rights of the plaintiff and others thought offensive to the defendants who have sought, and so far succeeded, in infringing upon appellant's rights of free association, freedom from imposition and establishment of the religious principles of others, freedom from imposition of punishments, freedom to pursue a livelihood and profession without being deprived thereof arbitrarily and capriciously, and each of the other rights set forth in the complaint as having been offended by defendants.

CONCLUSION

It was error to dismiss the complaint and the order of the District Court should be reversed.

Dated: New York, New York
September 5, 1974

Respectfully submitted,

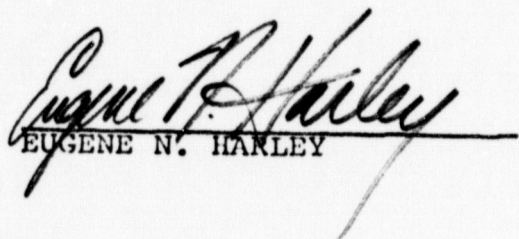


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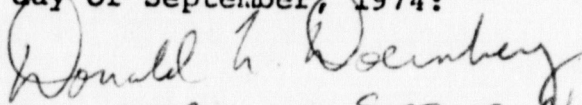
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

EUGENE N. HARLEY, being duly sworn, deposes and says:

I am not a party to this action. I am over eighteen years of age. I reside at 114 West 16 Street, New York, New York. On the 9th day of September, 1974, I served two copies of the within Appellant's Brief and one copy of the Appendix filed herewith upon Hayt, Hayt, Tolmach & Landau and Clark, Gagliardi & Miller, the attorneys for all of the appellees in this action, at 55 Northern Boulevard, Great Neck, New York, and 175 Main Street, White Plains, New York, respectively, the addresses designated by said attorneys for that purpose by depositing true copies of same enclosed in postpaid properly addressed wrappers, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


EUGENE N. HARLEY

Sworn to before me this 9th
day of September, 1974:


NOTARY PUBLIC - STATE OF NEW YORK
No. 31-0987400
Qualified in New York County
Commission Expires March 30, 1975

